

IN THE SUPREME COURT OF FLORIDA

INQUIRY CONCERNING
A JUDGE NO. 02-487

Supreme Court Case
No.: SC03-1171

RESPONDENT'S MOTION TO DISMISS

The Honorable Gregory P. Holder (“Judge Holder” or “Colonel Holder”), by counsel, respectfully moves the Hearing Panel of the Florida Judicial Qualifications Commission (“the Panel”) to dismiss the charges currently pending against him. The grounds upon which this Motion is based are set forth below.

1. Judge Holder, a Colonel in the United States Air Force Reserve, has served in the United States Air Force (“Air Force”), both active and reserve duty, for almost 29 years.

2. In January 1998, Colonel Holder, who then held the rank of Lieutenant Colonel, submitted a paper to the Air War College (“AWC”) in partial fulfillment of the AWC requirements.

3. Four years later, in early 2002, an envelope allegedly was anonymously placed under Lieutenant Colonel Jeffrey Del Fuoco’s office door at the United States Army Reserve Headquarters in St. Petersburg. The envelope contained a purported copy of Holder’s AWC paper (the “purported Holder paper”), along with a copy of a paper submitted by E. David Hoard (the “Hoard paper”) to the AWC in 1996 on a similar topic. The purported Holder paper and Hoard paper allegedly were accompanied by a note with words to the effect that “I thought you would be interested in this or something should be

done about this.” Neither the note nor the envelope has been produced in this proceeding.

4. In civilian life, Lieutenant Colonel Del Fuoco is an Assistant United States Attorney with the United States Attorney’s Office in Tampa, Florida. For unexplained reasons, it appears that a significant period of time elapsed before Lieutenant Colonel Del Fuoco provided a copy of the purported Holder paper and Hoard paper to Assistant United States Attorney (AUSA) Jeffrey S. Downing (“Downing”), Deputy Chief of the Public Corruption Section for the United States Attorney’s Office.

5. In January 2003, AUSA Downing provided the Air Force with a copy of the purported Holder paper and a copy of the Hoard paper and advised that it appeared that a significant portion of the purported Holder paper had been copied verbatim or substantially verbatim from Hoard’s paper. As a result, the Air Force instituted an investigation to determine if Colonel Holder had:

submitted a plagiarized paper thus committing conduct unbecoming of an officer in violation of Article 133 of the Uniform Code of Military Justice; and

made a false statement when he certified that the paper he submitted was his original work in violation of Article 107 of the Uniform Code of Military Justice.

6. In May 2003, Major General Thomas Fiscus, The Judge Advocate General of the United States Air Force, withdrew Colonel Holder’s designation as a Judge Advocate. Various responses were filed on Colonel Holder’s

behalf, which refuted the allegations against him and provided ample evidence demonstrating that these allegations were untrue. The evidence submitted to the Air Force included at least four affidavits stating that the purported Holder paper was not the paper submitted by Colonel Holder to the AWC in 1998.

7. Consequently, on December 19, 2003, Major General Fiscus, The Judge Advocate General of the Air Force, having fully considered all of the evidence, restored Colonel Holder's designation as a Judge Advocate. *See* Exhibit 1.

8. Sometime during 2003, while the investigation was being conducted by the Air Force, the Florida Judicial Qualifications Commission (the "JQC") instituted its own proceeding regarding Judge Holder's military conduct. Electing not to stay the proceeding, on July 16, 2003, the JQC filed a Notice of Formal Charges (the "Charges") asserting that Judge Holder had submitted a plagiarized paper and made a false statement.

9. The Charges specifically stated that these acts, *if they occurred*, constituted a violation of Canons 1, 2 and 5 of the Code of Judicial Conduct.

10. The recent decision of the Air Force, however, resolves in Judge Holder's favor the allegations regarding his military conduct.

11. Courts have consistently recognized that "the military constitutes a specialized community governed by a separate discipline from that of the civilian." *Von Hoffburg v. Alexander*, 615 F.2d 633, 637 (5th Cir. 1980); *see also Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953); *Lawrence v. McCarthy*, 344 F.3d 467 (5th Cir. 2003). Thus, "orderly government requires that the

judiciary scrupulously avoid interfering with legitimate Army matters.” *Id.* Accordingly, as a matter of comity and due deference to the military proceeding, the JQC should dismiss the Charges against Judge Holder for the following reasons:

- a. the Charges are solely based on an Air Force matter, *i.e.*, Colonel Holder’s alleged military misconduct, and not any misconduct which allegedly occurred in connection with the performance of his duties as a circuit judge;
- b. the Air Force has conducted a thorough investigation and decided to restore Colonel Holder’s status as a Judge Advocate; and
- c. the evidence considered by the Air Force is the same evidence as will be considered by the JQC in a final evidentiary hearing and The Judge Advocate General of the Air Force utilized the same evidentiary standard that must be applied by the JQC.

See e.g. Neal v. State, 135 So.2d 891 (Fla. 1st DCA 1961) (judicial comity allows tribunal to give effect to decisions of another out of deference and respect).

12. The JQC’s failure to respect the decision of the Air Force will force Judge Holder, who has been restored to his previous status by the Air Force, to subject himself to a subsequent non-military proceeding before the Panel. The Panel will be applying the exact same evidence and, difficult as it is to imagine given the weight of the evidence supporting Judge Holder, the Panel could potentially reach a different result. By doing so, the Panel will undermine the public confidence in the JQC, as well as unfairly impact Judge Holder’s reputation and livelihood. Moreover, such a result would be entirely

inequitable, impede the orderly administration of justice, completely fail to give the Air Force decision the appropriate deference, and most assuredly be subject to reversal by the Florida Supreme Court.

CONCLUSION

For the reasons set forth above, Judge Holder respectfully requests that the Panel dismiss the charges against him.

Dated: January 5, 2003

Respectfully Submitted,

David B. Weinstein, Esq.
Florida Bar Number 604410
Virginia Zock Houser, Esq.
Florida Bar Number 848859
BALES WEINSTEIN
Post Office Box 172179
Tampa, Florida 33672-0179
Telephone No.: (813) 224-9100
Telecopier No.: (813) 224-9109

and

Gregory W. Kehoe, Esq.
Fla. Bar Number: 0486140
James Hoyer Newcomer &
Smiljanich, PA
4830 W. Kennedy Blvd., Suite 550
Tampa FL 33609
Telephone No. (813) 286-4100
Facsimile No. (813) 286-4174

Attorneys for Honorable Gregory P.
Holder

Certificate of Service

I certify that on January 5, 2004, a copy of the foregoing Respondent's Motion to Dismiss has been served by U.S. Mail to Ms. Brooke Kennerly, Hearing Panel Executive Director, 1110 Thomasville Road, Tallahassee, FL 32303; and by telecopier and U.S. Mail to: Honorable John P. Kuder, Chairman of the Hearing Panel, Judicial Building, 190 Governmental Center, Pensacola, FL 32501; John Baranek, Counsel to the Hearing Panel, Ausley & McMullen, P.O. Box 391, Tallahassee, Florida 32302; Charles P. Pillans, III, Esq., JQC Special Counsel, Bedell Ditmar DeVault Pillans & Coxe, P.A., The Bedell Building, 101 East Adams Street, Jacksonville, FL 333202; and, Thomas C. MacDonald, Jr., JQC General Counsel, 1904 Holly Lane, Tampa, FL 33629.

Attorney